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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

In re the Marriage of GILBERT II and
AMY LYNN PAPAZIAN.

GILBERT PAPAZIAN II,
Respondent,

v.

AMY LYNN PAPAZIAN,
Appellant.

A121527

(San Mateo County
Super. Ct. No. FL071764)

I. INTRODUCTION

This is appellant Amy Lynn Papazian's fifth appeal from post-judgment rulings in favor of respondent Gilbert Papazian. In an earlier opinion, we affirmed the trial court's rulings in three of these appeals (A114961, A116750, A117270) and granted Gilbert's motion to dismiss a fourth appeal (A122113).

In this appeal, Amy challenges the trial court's order denying a motion submitted by her former trial counsel, pursuant to *In re Marriage of Borson* (1974) 37 Cal.App.3d 632. Because Amy's former trial counsel did not have Amy's consent to file this motion while he was still retained by her and, in any event, because the trial court did not abuse its discretion in denying his motion, we find no error.

II. FACTUAL AND PROCEDURAL BACKGROUND

We need not detail the extensive history of the litigation between Amy and Gilbert. Suffice it to say that, by June 19, 2007, the family law judge involved in this matter observed that Amy and her counsel were “out of control,” having filed three-quarters of the papers in the case. After Gilbert argued that the trial court should award sole custody of their children to him, thus ending Amy’s litigation tactics, the court took the custody and visitation issues under submission.

The following day, on June 20, 2007, Amy filed a declaration in which she informed the court that she had discharged her attorney immediately after the hearing. She claimed that she had been “under the undue influence of my attorney and his staff” and that this influence had “substantially affected my decisions in this case and the course of this litigation.” That same day, Amy’s attorney, Henry Koehler, filed a motion for fees and costs. In his supporting declaration, Koehler sought, as “other relief” “[r]eserve on attorney fees and costs . . . pursuant to *In Re Marriage of Borson*, 37 Cal.App.3d 632 (1974) from Petitioner Gilbert Papazian II and third parties”

A substitution of attorney form was executed on June 20, 2007, and filed the next day. Several days later, Amy filed a document entitled “Declaration . . . Re: Substitution of Attorney.” In it she stated that “[s]ince my last declaration that was filed on June 20, 2007, I have received a signed Substitution of Attorney from my former attorney which I also signed and filed June 22, 2007. After reviewing the Register of Actions online, I noticed that a Borson motion for attorney fees and costs had been filed with this court on June 20, 2007. I understand now, that while I was waiting for my attorney to fax his signed substitution of Attorney to my home, he was preparing and filing his Borson motion, now set down for hearing on July 20, 2007. It was never discussed with me, nor was I informed of what a Borson motion is or its effect on me as his client or now former client. I did not and do not now support filing this motion.”

On July 13, 2007, Amy filed a “Supplemental Declaration” with regard to the *Borson* motion. In this declaration, she stated that “I now understand the practical and financial necessity for the court to retain jurisdiction over the award of attorney fees to

my former counsel, Mr. Koehler. Therefore, I support the *Borson* motion and request the court to retain jurisdiction over attorney fees.”

On July 16, 2007, at a hearing on a contempt matter involving attorney Koehler, the court inquired about the *Borson* motion. In response to the trial court’s question about his estimate for the time required to hear the motion, Koehler responded, “We just submit it. I mean it’s very simple, it’s nothing complex. . . .”

Ultimately, the court requested that the parties submit briefing on the motion by certain dates. The parties further waived a hearing on “the *Borson* motion and various 2030 and 271 motions that are filed at this time.”

On October 16, 2007, the parties agreed to continue the pending request for fees under section 2030 and the *Borson* motion. At a hearing on December 17, 2007, the trial court again announced its intention to take the *Borson* motion under submission. The court also told the parties that they could submit, by January 4, 2008, “not more than a three page pleading with fees statements attached, if they wish, but no more than three pages. . . .” Amy, who was by this time represented by new counsel, notified Koehler by letter of the court’s intention to allow the opportunity for further briefing.

On January 3, 2008, Koehler filed a reply brief. He reiterated that his motion was simply intended to reserve jurisdiction over the fee issue and was not a fee motion under section 2030, and documentation was not being submitted in support of a request for fees.

On March 7, 2008, the trial court filed a “ruling on ‘Borson’ motion.” The court’s order read as follows: “The court having taken under submission what has been referred to as the ‘Borson’ motion filed by Respondent’s prior counsel Henry Koehler, the Court indicates as follows: Mr. Koehler’s request to reserve hearing on attorney’s fees is denied. As of this department’s concluding involvement with the Papazian matter, it is the Court’s belief that no attorney’s fees should be awarded or even considered further as regards Mr. Koehler’s involvement with the case. The Court’s prior order of fees payable by Respondent and the Court[’s] repeatedly expressed displeasure with Mr. Koehler’s conduct of this case demonstrate fully [why] this ruling is made.” The order also asked

that “petitioner’s attorney” “prepare and submit an order consistent with these comments.”

This timely appeal followed.

III. DISCUSSION

A. *Borson Motion*

A motion made pursuant to *In re Marriage of Borson* (1974) 37 Cal.App.3d 632, 637-638 (*Borson*) permits an attorney “discharged while the action is pending [to] . . . file a motion on the client’s behalf asking the court to set the fee amount and determine how it is to be paid The fee issue can then be resolved at the hearing on the motion, or the court may reserve jurisdiction to make the award at trial. [Citations.]” (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶¶ 14:308 to 14:310; see also *Borson, supra*, 37 Cal.App.3d at pp. 637-638.)

However, an attorney may not file such a motion without his client's consent. (*In re Marriage of Simpson* (2006) 141 Cal.App.4th 707, 712-713; *In re Marriage of Read* (2002) 97 Cal.App.4th 476, 481.) Here, in a declaration filed several days after the *Borson* motion, Amy made clear to the court that, at the time the motion was filed, she did not authorize it: “It was never discussed with me, nor was I informed of what a *Borson* motion is or its effect on me as his client or now former client. I did not and do not now support filing this motion.” A statement she made several months later that she now supported the motion does not alter the fact that, when the motion was made, she did not authorize it. (*Borson, supra*, 37 Cal.App.3d at p. 639.) Without her consent, the motion could not be filed or heard by the court.

In addition to this procedural bar to the *Borson* motion, we also find that the court was well within its discretion to conclude that a fee award of any amount to Koehler would be unjustified because of the way in which this case has been overlitigated in proportion to the issues involved. (*In re Marriage of Huntington* (1992) 10 Cal.App.4th 1513, 1534; *In re Marriage of Behrens* (1982) 137 Cal.App.3d 562, 576.)

As for appellant’s argument that she was denied due process because she was not given notice of briefing schedules, we note that appellant submitted the motion at the July

16, 2007 hearing, agreed to waive a hearing, and was notified by counsel of the opportunity to submit further briefing, of which she took full advantage. No due process violation occurred here.

IV. DISPOSTION

The order appealed from is affirmed. Costs on appeal to respondent.

Haerle, Acting P.J.

We concur:

Lambden, J.

Richman, J.